18 292

(5)

No. 06-413

Supreme Court, U.S.
FILED
FEB 21 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF OREGON, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, IDAHO, ILLINOIS, INDIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

HARDY MYERS
Attorney General of Oregon
MARY WILLIAMS
Solicitor General
* ROLF MOAN
Assistant Attorney General
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002

Of Counsel:
Dan Schweitzer
2030 M St., NW, 8th Floor
Washington, DC 20036
(202) 326-6010

* *Counsel of Record*

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DUSTIN MCDANIEL
Attorney General of Arkansas
323 Center Street
Little Rock, AR 72201

EDMUND G. BROWN, JR.
Attorney General of California
1300 I Street
Suite 125
P.O. Box 944255
Sacramento, CA 94244

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Seventh Floor
Denver, CO 80203

JOSEPH R. BIDEN, III
Attorney General of Delaware
Delaware Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

LAWRENCE G. WASDEN
Attorney General of Idaho
PO Box 83720
Boise, ID 83720

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

STEVE CARTER
Attorney General of Indiana
Indiana Govt. Center South
Fifth Floor
302 E. Washington St.
Indianapolis, IN 46204

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
Department of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620

JON BRUNING
Attorney General of Nebraska
Nebraska Department of Justice
P.O. Box 98920
Lincoln, NE 68509

CATHERINE CORTEZ MASTO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

KELLY A. AYOTTE
Attorney General of New Hampshire
33 Capitol Street
Concord, NH 03301

GARY G. KING
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

MARC DANN
Attorney General of Ohio
30 East Broad St.
17th Floor
Columbus, OH 43215

W. A. DREW EDMONDSON
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

HENRY D. MCMASTER
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

LAWRENCE E. LONG
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501

GREG ABBOTT
Attorney General of Texas
PO Box 12548
Austin, TX 78711

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114

ROBERT F. MCDONNELL
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

PATRICK J. CRANK
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTIONS PRESENTED

The question presented by petitioner's certiorari petition subsumes the following narrower inquiries as well:

1. Does 28 U.S.C. §2254(e)(1) require federal habeas courts to apply a presumption of correctness to a state court's implicit factual findings?

2. If a habeas petitioner claims that a state trial court unconstitutionally removed a prospective juror for cause, does the court's ability to observe the juror's demeanor warrant deference on habeas review?

3. If a prospective juror's statements during *voir dire* support competing reasonable inferences about his or her willingness to follow the law, can the juror's removal for cause provide a basis for federal habeas relief?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AEDPA's presumption of correctness applies to implicit factual findings by state courts 5

A. AEDPA's text demonstrates that Congress intended the presumption of correctness to apply to state courts' implicit findings 7

B. If the presumption of correctness applies to explicit findings only, state court efficiency in criminal cases will be compromised 10

II. A state trial court's ability to observe a prospective juror's demeanor warrants deference 14

A. A trial court's ability to observe demeanor during *voir dire* should never be discounted 15

B. Deference to a trial court's ability to observe demeanor does not preclude meaningful federal court review 17

III. Because juror Deal's statements supported competing reasonable inferences about his willingness to follow the law, habeas relief is unwarranted 20

IV. The state court judgment here cannot be described as "contrary to" this Court's existing case law. 24

A. It must be presumed that the state courts applied the correct legal standard 25

B. Because the state court decision here does not differ from results reached by this Court when addressing "materially indistinguishable" facts, it is not contrary to this Court's jurisprudence 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Texas, 448 U.S. 38 (1980) 6

Anderson v. Bessemer City, 470 U.S. 564 (1985) 22

Ball v. Gladden, 443 P.2d 621 (Or. 1968) 10

Batson v. Kentucky, 476 U.S. 79 (1980) 18

Campbell v. Vaughn, 209 F.3d 280 (3d Cir. 2000) 12

Charles v. Texas, 146 S.W.3d 204 (Tex. Crim. App. 2004) 12

Crespo v. Armontrout, 818 F.2d 684 (8th Cir. 1987) 11

Darden v. Wainwright, 477 U.S. 168 (1986) 6 n.1

Gray v. Mississippi, 481 U.S. 648 (1986) 4, 27-28

Hernandez v. New York, 500 U.S. 352 (1991) 18, 22

Lichau v. Baldwin, 39 P.3d 851 (Or. 2002) 12

Maine v. Taylor, 477 U.S. 131 (1986) 22

Maine v. Watson, 900 A.2d 702 (Me. 2006) 11

Marshall v. Lonberger, 459 U.S. 422 (1982) 9, 22-23

Miller-El v. Cockrell, 537 U.S. 322 (2003) 8, 17

Miller-El v. Cockrell, 545 U.S. 231 (2005) 18-19, 23

Newsted v. Gibson, 158 F.3d 1085 (10th Cir. 1998) 12

Oregon v. Buchanan, 57 P.3d 930 (Or. Ct. App. 2002) . . . 10

Oregon v. Plummer, 980 P.2d 676 (Or. Ct. App. 1999) . . 11

Patton v. Yount, 467 U.S. 1025 (1984)) 15-16

Purkett v. Elem, 514 U.S. 765 (1995) 18

Quinn v. Texas, 958 S.W.2d 395
(Tex. Crim. App. 1997) 11

Rice v. Collins, 546 U.S. 333 (2006) 6, 16, 23

Sprosty v. Buchler, 79 F.3d 635 (7th Cir. 1996) 11-12

Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990) 12

Ventura v. Meacham, 957 F.2d 1048 (2d Cir. 1992) 12

Wainwright v. Witt, 469 U.S. 412 (1985) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 26

Witherspoon v. Illinois, 391 U.S. 510 (1968) 5

Woodford v. Visciotti, 537 U.S. 19 (2002) 25

Young v. Dretke, 356 F.3d 616 (5th Cir. 2004) 12

STATUTES AND RULES:

Fed. R. Civ. P. 52 (a) 22

Former 28 U.S.C. §2254(d) 2, 7-10

28 U.S.C. §2254(d)(1) 4, 28

28 U.S.C. §2254(d)(2) 4, 19, 23

28 U.S.C. §2254(e)(1) 2, 4, 6-8, 19, 23, 24

INTEREST OF THE AMICI CURIAE

This case involves the degree of deference that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) —codified in pertinent part at 28 U.S.C. §2254—requires federal habeas courts to give to state court factual findings. This case thus implicates the amici States' interests in protecting the finality of criminal convictions that emerge from their courts, and in maintaining criminal justice systems that deter criminal acts and otherwise promote public safety. Amici also possess an abiding interest in the principles of comity and federalism that Congress intended to promote by adopting §2254.

SUMMARY OF ARGUMENT

Under *Wainwright v. Witt*, 469 U.S. 412 (1985), the trial court in a capital case may remove a prospective juror for cause if the juror's personal views "would prevent or substantially impair" his performance as a juror. In this case, the Ninth Circuit held that removal of prospective juror Deal for cause at respondent's aggravated murder trial was "contrary to" *Wainwright v. Witt*, and that AEDPA thus entitles respondent to federal habeas relief. But if the Ninth Circuit is correct, AEDPA *decreased* the deference due to state court factual findings in criminal cases, despite Congress's intent to require *increased* deference. The Ninth Circuit's reasoning contains four fundamental flaws.

1. Although AEDPA requires federal courts to presume that state court factual findings are correct, the Ninth Circuit refused to apply the presumption. It reasoned that neither the trial court nor the Washington Supreme Court had expressly found that Deal's personal views substantially impaired his ability to follow the law. But by removing Deal for cause, the state trial court necessarily —albeit implicitly— made that finding. State trial courts regularly make implicit factual findings in criminal cases, and state appellate courts regularly rely on those findings. If AEDPA's presumption of correctness is inapplicable to implicit findings, state trial courts will

deem it necessary to articulate all factual findings on each discrete legal issue that arises in the course of a case, and their ability to conduct criminal trials efficiently will be compromised.

Unsurprisingly, then, Congress drafted 28 U.S.C. §2254(e)(1) in general terms, applying the presumption of correctness to "a determination of a factual issue made by a State court." Congress simultaneously dispensed with *former* §2254(d)'s requirement that state court factual determinations are presumed correct only if "evidenced by . . . written indicia." By focusing on "determination[s] of a factual issue" generally, and by dispensing with more particular descriptions of the determinations in question, AEDPA's text requires that *any* state court factual finding—regardless of form, and whether express or implicit—is presumed correct. Tellingly, even under *former* §2254(d), this Court had held that a state court need not make express findings of juror bias to benefit from the presumption of correctness. Because AEDPA was intended to require even greater deference to state court findings than previously had been required, §2254(e)(1)'s presumption of correctness—no less than *former* §2254(d)'s presumption—necessarily applies to implicit state court findings.

2. The Ninth Circuit concluded that Deal's most general statements— that he would follow instructions, and that he "could" consider a death sentence—are unambiguous on their face, and that the trial court's ability to observe Deal's demeanor thus was without significance. But a trial court's ability to observe demeanor is potentially significant *whenever* it assesses the meaning and credibility of a juror's statements. As this Court repeatedly has explained, jury selection's idiosyncratic nature, and jurors' varying levels of education and courtroom experience, can make it difficult to assess juror statements accurately. Even when statements are unambiguous on their face, physical demeanor can demonstrate that they should not be taken at face value. In a case like this—in which some of Deal's statements suggested a willingness to vote for death only if the state proved facts that Washington law did not require it

to prove—demeanor can prove crucial to gauging whether a juror will perform his duties.

3. In essence, the Ninth Circuit held that Deal's removal would have been appropriate only if Deal had affirmatively stated that he was unwilling to follow instructions, or had affirmatively stated that he could never vote for death. Yet this Court's pre- and post-AEDPA decisions demonstrate that if the record supports competing reasonable inferences and if a state trial court chooses one of those inferences in resolving an issue, its decision provides no basis for habeas relief. Here, although Deal stated a general willingness to follow instructions and consider a death sentence, he also suggested that death would be appropriate only if the state proved that respondent would kill again or would "reviolate if released." Because Washington law did not require the State to prove those facts, a reasonable factfinder could have construed Deal's statements as reflecting an intent to substitute his personal standards for those created by Washington law. The record thereby permitted the trial court to find that Deal's personal views substantially impaired his ability to perform his duties. That finding is entitled to deference.

4. Finally, the Ninth Circuit erred by describing the state court decision as "directly contrary to" Supreme Court precedent. Because the Washington Supreme Court did not expressly find that Deal's personal views substantially impaired his abilities to follow the law, the Ninth Circuit concluded that it "applied the wrong standard." Yet both before and after AEDPA, this Court consistently has presumed that state courts apply correct legal standards. In this case, nothing in the record suggests that the Washington courts intended to apply anything other than the *Wainwright v. Witt* standard to Deal's removal. It thus must be presumed that they applied the *Wainwright v. Witt* standard.

In addition, the state court decision does not differ from results that this Court has reached when addressing "materially

indistinguishable" facts. For that reason also, it cannot be described as "contrary to" this Court's jurisprudence. The Ninth Circuit analogized Deal's statements to statements that failed to justify a for-cause removal in *Gray v. Mississippi,* 481 U.S. 648 (1986), but *Gray's* facts were significantly different. Unlike Deal, the juror at issue in *Gray* never qualified her general willingness to consider a death sentence. Further, the state supreme court in *Gray* affirmatively found that the juror in question was "clearly qualified to be seated as a juror," while the state courts in this case implicitly made the opposite finding. Because *Gray's* facts are not "materially indistinguishable" from those in this case, the state court decision is not "contrary to" this Court's case law. Federal habeas relief is unwarranted.

ARGUMENT

This case requires the Court once again to examine Congress's intent in adopting AEDPA, which modified the circumstances under which federal habeas courts may invalidate state court criminal judgments. To obtain relief under AEDPA, respondent needed to establish that the state court judgment (1) is "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent, or (2) is based on an "unreasonable determination of the facts." 28 U.S.C. §§2254(d)(1) and (2). Moreover, under 28 U.S.C. §2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and respondent bore "the burden of rebutting the presumption of correctness by clear and convincing evidence."

During jury selection in respondent's aggravated murder case, the state trial court granted the State's motion to excuse prospective juror Deal for cause. A jury subsequently convicted respondent of aggravated murder and sentenced him to death, and the Washington Supreme Court affirmed the trial court judgment on direct review. On federal habeas review, the Ninth Circuit held that Deal's for-cause removal violated respondent's Sixth Amendment and due

process rights. Pet. App. 19a-20a. As a result, the Ninth Circuit held that respondent is entitled to federal habeas relief with respect to his sentence, although not with respect to his conviction. Pet. App. 22a & n.11.

In its decision, the Ninth Circuit purported to "apply the substantive review standards of [AEDPA]." App. 6a n.2. Yet the Ninth Circuit ultimately ignored Congress's intent in adopting AEDPA and this Court's prior constructions of AEDPA. Indeed, if the Ninth Circuit's approach in this case is deemed correct, Congress's attempts to require federal habeas court deference to state court factual determinations, and to impose greater restrictions on federal court authority to vacate state convictions, will be rendered largely futile.

I. AEDPA's presumption of correctness applies to implicit factual findings by state courts.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court "held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) (describing *Witherspoon*). Yet "the *Witherspoon* Court also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." *Witt*, 469 U.S. at 416. This Court thus has held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment" is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (*quoting Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In this case, the Ninth Circuit deemed it significant that neither the Washington Supreme Court nor the state trial court had expressly found that juror Deal's personal views substantially impaired his ability to perform his duties. The Ninth Circuit concluded that the dissent—in suggesting that the trial court had adopted the prosecutor's suggestion that Deal "could not follow his oath and faithfully apply Washington's capital sentencing law" —"would impute to the state trial court a finding it never made." Pet. App. 20a n.10. The Ninth Circuit noted that, although the Washington Supreme Court concluded that two other excused jurors in this case were "'substantially impaired' in their ability to perform their duties,'" a "similar finding is missing from [that] court's discussion of [Deal]." Pet. App. 13a. Consequently, the Ninth Circuit deemed 28 U.S.C. §2254(e)(1)'s presumption of correctness inapplicable. *See* Pet. App. 20a n.10 (distinguishing *Rice v. Collins*, 546 U.S. 333 (2006), which dissent had described as applying §2254(e)(1)'s presumption under analogous circumstances, on basis that Washington Supreme Court "nowhere found that juror [Deal] could not follow his oath"); Pet. App. 36a-37a (Tallman, J., dissenting) (describing *Rice v. Collins*). That conclusion is without merit.

By removing Deal for cause, the state trial court necessarily found that Deal's views on capital punishment would prevent or substantially impair his ability to perform his duties as a juror.[1] And by affirming the trial court's judgment on direct appeal, the Washington Supreme Court necessarily found that the trial court had made any and all findings required by law. AEDPA's presumption of correctness—that is, §2254(e)(1)'s requirement that

---

[1]It is undisputed that a determination that a prospective juror is "biased"—in the sense that his personal views impair his ability to follow instructions—is a factual finding. *See Darden v. Wainwright*, 477 U.S. 168, 175 (1986) (*Wainwright v. Witt* "made it clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding").

"a determination of a factual issue made by a State court shall be presumed to be correct"—applies to each of those implicit findings. Applying the presumption in that manner is consistent with Congress's intent and with this Court's federal habeas jurisprudence. The Ninth Circuit's refusal to apply the presumption to implicit findings in this case is without a principled basis.

A. AEDPA's text demonstrates that Congress intended the presumption of correctness to apply to state courts' implicit findings.

American jurisprudence generally presumes that a court, in making a ruling, made factual findings consistent with that ruling, even if those findings do not appear in the record. That presumption is a sensible one. Judges are, by definition, individuals who are trained in the law and who are required to resolve all pertinent factual and legal disputes that parties present to them in a particular case. Because a single case can require a judge to resolve significant numbers of those disputes, it is neither practical nor realistic to expect a court unfailingly to articulate all of its findings with respect to each discrete ruling it makes.

It therefore is unsurprising that 28 U.S.C. §2254(e)(1) requires federal habeas courts to apply a presumption of correctness not only to express state court findings, but to implicit findings as well. Prior to AEDPA's 1996 enactment, *former* 28 U.S.C. §2254(d) provided that "a determination after a hearing on the merits of a factual issue, made by a State court . . . , evidenced by a written finding, written opinion, or other reliable and adequate written indicia, [generally] shall be presumed to be correct." *See Witt*, 469 U.S. at 426 n.7 (quoting provision). AEDPA dispensed altogether with *former* 28 U.S.C. §2254(d)'s requirement that state court factual determinations– to "be presumed to be correct"—must be "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." Under AEDPA, 28 U.S.C.

§2254(e)(1), rather than referring to "written indicia" of a state court's factual determinations, or to any other particular form that findings must take, more generally provides that "a *determination* of a factual issue made by a State court shall be presumed to be correct." (Emphasis added.) Its general reference to "a determination of a factual issue" suggests that *any* factual determination—regardless of form, and whether or not expressly articulated—warrants the presumption of correctness.

That conclusion comports with this Court's observations about Congress's intent in adopting AEDPA, and about AEDPA's effect. This Court has observed that "[s]tatutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 337 (2003). "Where 28 U.S.C. §2254 applies, our habeas jurisprudence embodies this deference" to state courts. *Miller-El I*, 537 U.S. at 340. Moreover, and as discussed in greater detail below, even before Congress adopted AEDPA and modified §2254, §2254 required federal habeas courts to presume that implicit factual findings by state courts were correct. Because Congress intended AEDPA to require even greater deference to state court decisions than previously had been required, AEDPA—no less than *former* §2254—necessarily requires federal courts to presume that implicit state court findings are correct.

Prior to AEDPA, this Court had held that implicit state court findings must be presumed correct. In *Wainwright v. Witt*, Witt's habeas petition alleged that the state trial court's decision to excuse juror Colby for bias was not entitled to a presumption of correctness because it was not "evidenced by a written finding, written opinion, or other reliable and written indicia." 469 U.S. at 430. Although the state trial court had made no express finding that Colby was biased, this Court held that the presumption of correctness applied:

> The transcript of the *voir dire* . . . shows that Colby was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked juror Colby to "step down." Nothing more was required under the circumstances to satisfy [*former* §2254(d)].

469 U.S. at 430. "We decline," the Court wrote, "to require the judge to write out in a separate memorandum his specific findings on each juror excused." *Id.* "Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning." *Id.* Instead, "[t]he finding is evident from the record" and "is therefore 'presumed correct' unless one of the enumerated reasons [in *former* 28 U.S.C. §2254(d)] for avoiding the presumption is present here." *Witt,* 469 U.S. at 430-31.

In *Marshall v. Lonberger,* 459 U.S. 422, 434 (1982), this Court similarly refused to "redetermine the credibility" of testimony that a state court implicitly had rejected. Although the defendant in an aggravated murder case testified that he had not knowingly entered a guilty plea for attempted murder, the state trial court admitted evidence of the attempted-murder conviction as evidence in the aggravated murder trial. *Id.* at 426-26, 428-29, 432. This Court described the state court's evidentiary ruling as "tantamount to a refusal to believe the [prisoner's] testimony" that he had misunderstood his earlier plea. *Id.* at 434. This Court essentially deferred to the state court's credibility determination, and presumed it correct, even though the state court had made no express credibility finding. *See* 459 U.S. at 434 ("28 U.S.C. §2254(d) gives federal habeas courts no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them").

Even prior to AEDPA, then, 28 U.S.C. §2254(d) required federal habeas courts to presume that implicit state court findings

were correct. AEDPA, in further restricting federal court review of state court determinations, requires at least that same level of deference.

B. If the presumption of correctness applies to explicit findings only, state court efficiency in criminal cases will be compromised.

In reviewing criminal convictions on direct appeal and in post-conviction cases, state appellate courts regularly rely on trial courts' implicit factual findings. If the presumption of correctness applies to explicit findings only, many state trial courts will be forced to alter longstanding practices, and to begin articulating all factual assessments and all legal reasoning that supports each discrete legal ruling made in the course of a trial. AEDPA should not be construed so that one of its core features—according greater deference to state court factual findings—can be attained only if state courts needlessly and inefficiently change their everyday practices.

State appellate courts regularly rely on implicit trial court findings when reviewing convictions on direct appeal. The Oregon Supreme Court, for example, has explained—while discussing "historical factual findings"—that "[i]f findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the ultimate conclusion . . . made by the trial court." *Ball v. Gladden*, 443 P.2d 621, 622 (Or. 1968). Oregon appellate courts consistently apply that principle when conducting direct review of state criminal convictions. *See, e.g., Oregon v. Buchanan*, 57 P.3d 930, 933 (Or. Ct. App. 2002) (relying on trial court's implicit factual findings when reviewing ruling that search exceeded scope of consent). Other States' appellate courts similarly rely on implicit factual findings when reviewing criminal convictions on direct appeal. *See, e.g., Maine v. Watson*,

900 A.2d 702, 713 (Me. 2006) (stating, in reviewing validity of waiver of counsel, that court "review[s] any express *or implicit* factual findings for clear error") (emphasis added); *Quinn v. Texas*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997) (stating, while reviewing motion for new trial, that "we in essence view the evidence in the light most favorable to the trial court's findings (or ruling, if there are no pertinent findings)").

A criminal trial court's implicit factual findings can prove dispositive in a wide variety of contexts. Issues that regularly are resolved by implicit trial court findings in state court criminal cases include the following:

- The validity of a defendant's waiver of counsel. *See, e.g., Maine v. Watson*, 900 A.2d at 713 (noting, while reviewing validity of waiver of right to counsel, that Maine Supreme Judicial Court will review "any express or implicit factual findings" by trial court for clear error).

- The validity of a search or seizure. *See, e.g., Oregon v. Plummer*, 980 P.2d 676, 678-79 (Or. Ct. App. 1999) (reviewing whether officer possessed subjective probable cause to arrest under Oregon Constitution, and "assum[ing]" that the trial court—in granting motion to suppress—"did not believe [the officer's] testimony about what she saw").

- Whether officers read *Miranda* rights prior to a custodial interrogation. *See, e.g., Crespo v. Armontrout*, 818 F.2d 684, 685-86 (8th Cir. 1987) (noting that Missouri trial court denied motion to suppress defendant's statements "[w]ithout making factual findings concerning credibility" of defendant's testimony that officers never read *Miranda* rights).

- Whether a defendant waived *Miranda* rights. *See, e.g., Sprosty v. Buchler*, 79 F.3d 635, 644 (7th Cir. 1996) (noting that Wisconsin trial court's denial of suppression motion "lead[s] to the obvious inference that the judge discredited [witnesses'] testimony" that defendant asked to speak to an

attorney, although judge had not "specifically address[ed] the[ir] veracity").

- Motions for a new trial. *See, e.g., Charles v. Texas,* 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (noting, while reviewing denial of motion for new trial, that we "presume that all reasonable factual findings that could have been made against the losing party were made against that losing party"); *Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) (noting, in affirming denial of new trial motion, that California appellate court relied on "the trial court's implied factual determination 'that no juror misconduct occurred'").

In addition, state courts commonly rely on implicit findings to resolve state habeas or post-conviction proceedings. *See, e.g., Lichau v. Baldwin*, 39 P.3d 851, 857 (Or. 2002) (noting, while reviewing state post-conviction court's resolution of inadequate-assistance-of-counsel claim, that "we will presume that the facts were decided in a manner consistent with the [post-conviction court's] ultimate conclusion"); *Ventura v. Meacham,* 957 F.2d 1048, 1051, 1054-55 (2d Cir. 1992) (noting that Appellate Court of Connecticut, in reviewing denial of state habeas petition, relied on habeas trial court's "implied finding of fact" about reasons petitioner pleaded guilty); *Campbell v. Vaughn,* 209 F.3d 280, 290 (3d Cir. 2000) (noting that Pennsylvania Superior Court, in reviewing trial court's denial of post-conviction claim, "reviewed the evidence that the [post-conviction trial] court implicitly credited"); *Young v. Dretke,* 356 F.3d 616, 628-29 (5th Cir. 2004) (noting that Texas habeas trial court had made a dispositive "implicit factual determination"); *Newsted v. Gibson,* 158 F.3d 1085, 1088, 1091 (10th Cir. 1998) (concluding that Oklahoma Court of Criminal Appeals' "cursory" decision affirming denial of post-conviction petition "necessarily encompassed factual findings about the evidence in this case").

Accordingly, trial court judges across the country know that they need not make express factual findings on each issue that comes before them. Although appellate courts occasionally remind trial courts that express factual findings are helpful, trial court judges know that a failure to make express findings will not diminish the deference they are accorded in state or federal court. If AEDPA's presumption of correctness applies only to express factual findings, however, it will behoove state trial courts—in order to decrease the risk that a federal habeas petition will result in a retrial in state court—to articulate express factual findings with respect to each issue before them. Trial courts will be well advised to do so even if, as in this case, the ruling at issue has drawn no objection from the defendant. *See* Pet. App. 13a (noting lack of objection in this case, but also emphasizing that state courts made no express finding that Deal's view substantially impaired his abilities as a juror).

If the presumption of correctness applies only to express factual findings, state trial courts also will be well advised to articulate expressly the particular legal standards that they apply to each ruling, to reduce the likelihood that a reviewing court will misunderstand the import of any factual findings that the trial court has made. The result will be state court criminal proceedings in which trial courts, each time they make a legal ruling, painstakingly articulate both their findings and their reasoning. The result will be longer state criminal trials and longer state post-conviction proceedings. In short, whether AEDPA's presumption of correctness applies to implicit state court findings is significant not only to capital cases like this one, and to rulings involving "death-qualified" juries, but to all criminal and post-conviction cases tried in state courts, and to federal habeas cases generally.

II. A state trial court's ability to observe a prospective juror's demeanor warrants deference.

The Ninth Circuit acknowledged that "it is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor." Pet. App. 17a n.8. Nonetheless, the court refused to grant any practical significance to the state trial court's ability to observe juror Deal's demeanor. It concluded that "demeanor can only shed light on ambiguous language" and that, because Deal's "clear words were that he could impose the death penalty and would follow the court's instructions," demeanor could have no legal significance in this case. Pet. App. 17a n.8. But as this Court repeatedly has explained, a trial court's ability to observe demeanor is potentially significant *whenever* a question of juror impartiality is at issue, even if a juror's statements—on a cold transcript—appear unambiguous. The significance of that principle is even more pronounced in federal habeas cases, due to the highly deferential standard of review that AEDPA applies to state court decisions. If the Ninth Circuit is correct, and if juror Deal's demeanor is without legal import, the consequences are significant not only for cases involving removal of jurors for cause, but for cases involving peremptory challenges by prosecutors, and for all cases in which a trial court must assess witness credibility in the course of making evidentiary or other rulings.

A. A trial court's ability to observe demeanor during *voir dire* should never be discounted.

A trial court's ability to observe demeanor is potentially significant whenever it assesses statements by a prospective juror during jury selection. The need to defer to that ability is heightened in federal habeas cases, due to AEDPA. Although this Court has endorsed those principles before, they warrant reaffirmation, given the Ninth Circuit's failure to abide by them. Those principles are

consistent with AEDPA and with this court's repeated—and apt—observations about the unique nature of jury selection.

In *Wainwright v. Witt*, a pre-AEDPA case, the Court noted that, when a trial judge finds that a prospective juror is not biased, such a finding "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." 469 U.S. at 428. In making that observation, this Court emphasized the unique nature of the jury selection process. In determining if a "capital sentencing juror was properly excluded for cause," federal courts must recognize that a trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id.* at 429. Although "it is the adversary seeking exclusion who must demonstrate . . . that the potential juror lacks impartiality," the Court rejected the proposition "that a juror's bias [must] be proved with 'unmistakable clarity.'" *Id.* at 423-24. The Court explained that "[w]hat common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* "Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," and "this is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26.

This Court also focused on the idiosyncracies of the jury selection process in *Patton v. Yount*, 467 U.S. 1025, 1038 (1984), in explaining that ability to observe juror demeanor is "fundamental" to the process:

> Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated *voir dire* calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal.

> Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.

467 U.S. at 1038 n.14. As a result, it is risky to assume that a *voir dire* transcript, by itself, will sufficiently reflect a prospective juror's ability to fulfill his or her duties. Instead, it is the trial judge "who is best situated to determine competency to serve impartially," given that jurors—due to their varying levels of education and courtroom experience—"cannot be expected invariably to express themselves carefully or even consistently." 467 U.S. at 1039. Thus, "[t]he trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.*

In sum, jury selection's idiosyncratic character requires reviewing courts to accord "special deference" to a trial court's assessment of juror bias. 467 U.S. at 1038. Even a statement that appears unambiguous on the printed page should not automatically be taken at face value if made during jury selection. In *Rice v. Collins*, 546 U.S. 333, ___, 126 S. Ct. 969, 972-73 (2006), for example, a criminal defendant objected to one of the prosecution's peremptory challenges by arguing that the challenge was based on the juror's race. As a "race-neutral explanation" for the challenge, the prosecutor stated, in part, that the juror "had rolled her eyes in response to a question from the court." 126 S. Ct. at 973. Yet under normal circumstances, the record will not automatically reflect eye rolling or other telltale physical behavior that accompanies a juror's statements. Even a simple "yes" or "no," although unambiguous on the printed page, accurately might be described by those who observed the juror as reflecting uncertainty. *See Patton v. Yount*, 467 U.S. at 1040 (noting that prospective juror "appears simply to have answered 'yes' to almost any question put to him," and that "[i]t is here that the federal court's deference must operate" because "only the trial judge could tell which of these answers was said with the greatest comprehension and certainty").

Juror statements that appear unambiguous need not be taken at face value by a trial court, and they *should* not be taken at face value by a reviewing court. Instead, reviewing courts must at least entertain the possibility that physical demeanor may have informed the trial court's assessment of the juror's ability to follow the law. *See Miller-El I*, 537 U.S. at 339 (on federal habeas review of claim that prosecutor exercised peremptory challenges based on juror race, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"). Refusal to entertain that possibility is at odds with the realities of the jury selection process itself.

B. Deference to a trial court's ability to observe demeanor does not preclude meaningful federal court review.

The Ninth Circuit suggested that if the ability to observe demeanor is always potentially significant when reviewing a juror's removal for cause, meaningful federal court review will be precluded. Pet. App. 17a n.8. That concern is unwarranted. Although demeanor's significance can make the presumption of correctness difficult to overcome when challenging a *voir dire* ruling, meaningful habeas review is available nonetheless, and relief is not impossible to obtain. In some instances, a trial court's comments on the record will demonstrate that the court either misunderstood the pertinent legal standard or removed a juror based on a statement that — by itself, and as a matter of law — could not justify removal constitutionally. Relief will certainly be available under those circumstances, despite the trial court's ability to observe demeanor. Further, if a defendant believes that a juror's statements provide no basis for removal, and that the trial court did not rely on demeanor-based grounds to remove the juror, the defendant is free to inquire about those matters on the record at trial. He also is entitled to try to corroborate his suspicions at a post-conviction hearing. He may,

for example, be able to produce evidence demonstrating that the judge in question had expressly and consistently applied an incorrect legal standard when making similar rulings in that same case. Means do exist, in other words, to prove that a trial court erroneously removed a juror for cause, despite the general deference to which demeanor-based credibility assessments are entitled.

Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005), demonstrates that deference to a trial court's ability to observe demeanor does not preclude habeas relief based on *voir dire* rulings. In *Miller-El II*, a criminal defendant objected to the State's use of peremptory challenges to remove black venirepersons. 545 U.S. at 236-37. The state trial court overruled the objections, finding that the prosecutor's race-neutral explanations were "completely credible." *Id.* at 236. This Court had noted previously that a trial court's assessment of a prosecutor's demeanor and credibility can be essential in determining if a peremptory challenge was constitutional under *Batson v. Kentucky*, 476 U.S. 79 (1980). *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (reversing Eighth Circuit because it "gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility"); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province'") (*quoting Witt*, 469 U.S. at 428). Much like this case, *Miller-El II* thus involved the type of ruling in which a trial court's ability to assess credibility, based on personal observations of in-court demeanor, often is dispositive.

Nonetheless, the prisoner in *Miller-El II* presented sufficient evidence, in his federal habeas case, to overcome the presumption that the state court had correctly found the prosecutor's motives to be race-neutral. That evidence included "widely known evidence" that the prosecutor's office in question had, in fact, promulgated a "general policy . . . to exclude black venire members from juries at

the time Miller-El's jury was selected." 545 U.S. at 253. In the end, the evidence that Miller-El presented of a discriminatory motive was "too powerful to conclude anything but discrimination." *Id.* at 265. *Miller-El II* demonstrates that deference to a trial court's ability to observe demeanor when assessing credibility does not render habeas relief illusory, even when a *voir dire* ruling is at issue.

At the same time, it must be remembered that AEDPA's "standard [for obtaining relief] is demanding," *Miller-El II*, 545 U.S. at 240, and that "clear and convincing evidence" is required to rebut §2254(e)(1)'s presumption of correctness. Similarly, a state court ruling that is grounded on a factual determination—as any removal of a juror for cause must be—can warrant habeas relief only if it was "based on an unreasonable determination of the facts." 28 U.S.C. §2254(d)(2). In light of those standards, and because assessing a prospective juror's bias is peculiarly within a trial judge's province, a habeas petitioner *should* find it difficult to overcome a trial court's finding that a juror's beliefs impaired his ability to follow his oath. That principle is absolutely consistent with—and compelled by—AEDPA. It is equally consistent with this Court's pre- and post-AEDPA case law.

As the above discussion reflects, trial court assessments of demeanor play a vital role not only when a court assesses juror impartiality and qualifications in a capital case, but whenever a court assesses a *Batson* objection to a peremptory challenge. Trial court assessment of demeanor also is crucial whenever a trial court makes evidentiary rulings, or other rulings before or during trial, that require it to resolve conflicts in testimony. In all of those contexts, AEDPA requires deference to a trial court's ability to observe the demeanor of those in its courtroom.

III. Because juror Deal's statements supported competing reasonable inferences about his willingness to follow the law, habeas relief is unwarranted.

In holding Deal's removal unconstitutional, the Ninth Circuit emphasized statements that could support an inference that Deal would be willing to perform his duties as a juror, but it ignored Deal's more particular statements. The Ninth Circuit emphasized that Deal answered "yes" when asked if he "could consider" the death penalty, and when asked if he "would be willing to follow the law." Pet. 10a-11a & n.5. The Ninth Circuit held, in essence, that the trial court could have lawfully dismissed Deal only if he had affirmatively stated that he was unwilling to follow the court's instructions, or had affirmatively stated that he would not vote for a death sentence under any circumstances. *See* Pet. App. 17a n.8 (deeming it significant that Deal's "words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary"); Pet. App. 10a n.5 (noting that Deal "stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to") (emphasis in original).

Yet Deal made a number of more particular statements, and the trial court was entitled to infer from them that Deal's personal views would substantially impair his ability to follow Washington law. Deal wrote, in his juror questionnaire, that he was "in favor of the death penalty *if* it is proved . . . [that] a person has killed and would kill again." Pet. App. 240a-241a (emphasis added). When asked "about sort of the underlying reason why you think the death penalty is appropriate," Deal said, "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." Pet. App. 15a n.8. Further, Deal was informed during jury selection that a person convicted of aggravated murder would, at the least, be imprisoned for life without the possibility of parole. Pet. App. 15a n.8. Deal was asked, "can

you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" Pet. App. 16a n.8. He responded, "I would have to give that some thought." Pet. App. 16a n.8. Deal later agreed that if "a person is locked up for the rest of his life," he "could also consider and vote for the death penalty," but added that "I could *if* I was convinced that was the appropriate measure." Pet. App 17a n.8 (emphasis added).

A reasonable factfinder could infer, after reviewing those statements, that Deal would be willing to impose a death sentence *only* if the state first proved that the respondent would kill again, or proved that he would "reviolate if released." It is undisputed, however, that Washington law does not require, as a prerequisite to a death sentence, proof that a person convicted of aggravated murder would kill again. Similarly, because Washington law does not authorize a person convicted of aggravated murder to be eligible for parole or other release, the state need not prove that an offender will "reviolate if released" to prove that death is warranted. *See* Pet. App. 29a (Tallman, J., dissenting) (citing Wash. Rev. Code §10.95.060(4), and noting that "whether the defendant was likely to re-offend . . . is not the standard for imposition of the death penalty in an aggravated murder case under Washington law"). A reasonable factfinder could infer that Deal was willing to vote for a death sentence only under certain standards—standards more restrictive than those created by Washington law—that he himself had designed. That inference, if drawn by the trial court, justified Deal's removal. *See Witt*, 469 U.S. at 421-22 ("[w]hether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme," and it need not establish that the juror "would never vote for the death penalty").

This Court has made it clear that, if the record supports two permissible yet conflicting factual inferences, a state court's decision to draw one of those inferences requires deference. Nothing in

AEDPA, or in this Court's case law, provides a basis for abandoning that principle. Even on direct review—that is, in cases in which review is not as deferential as it is under AEDPA—this Court has required deference whenever a trial court has chosen between competing factual inferences. In *Hernandez*, this Court reviewed a New York Court of Appeals judgment affirming a state-court conviction, and it applied the "clear error" standard of review that federal courts generally apply to federal district court findings. 500 U.S. at 358, 369; *see* Fed. R. Civ. P. 52 (a) (district court "[f]indings of fact . . . shall not be set aside unless clearly erroneous"); *Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("the 'clearly erroneous' standard of review long has been applied to nonguilt findings of fact by district courts in criminal cases"). At issue in *Hernandez* was the state trial court's finding that the prosecutor possessed a race-neutral motive in removing Latino jurors. *Hernandez*, 500 U.S. at 369. This Court discerned no "clear error" by the state trial court, because the evidence supported conflicting views of the evidence:

> We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors. We have said that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Hernandez, 500 U.S. at 369. *Hernandez* demonstrates that, if the record can support "two permissible views of the evidence," and if a trial court adopts one of those views in resolving a legal issue, no clear error has occurred.

Even before AEDPA, this Court required federal habeas courts to apply a standard of review to state court factual determinations that was at least as deferential as the "clear error" standard. In *Marshall v. Lonberger*, 459 U.S. 422, 432, 434-35 (1982), the Court noted that "[w]e greatly doubt that Congress," in

adopting *former* §2254, "intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." And in enacting AEDPA, Congress intended to increase the level of deference that federal courts must accord to state court determinations.

Consequently, AEDPA requires a petitioner to demonstrate that the *only* plausible reading of the state court record is at odds with the state court's dispositive findings. Only by doing so can he overcome 28 U.S.C. §2254(e)(1)'s presumption of correctness, and demonstrate—under U.S.C. §2254(d)(2)—that the state court decision is based on "an unreasonable determination of the facts." But if the record plausibly can be read in two different ways, and if the state court drew the factual inference at odds with the claim for relief, relief is unavailable.

Miller-El II supports that conclusion. In *Miller-El II*, this Court concluded that Miller-El had overcome the presumption of correctness in 28 U.S.C. §2254(e)(1), and that the state court unreasonably had determined that the State's peremptory challenges were prompted by race-neutral motives. Miller-El did so, the Court explained, by presenting evidence of the prosecution's motive that was "too powerful to conclude *anything but* discrimination." 545 U.S. at 265 (emphasis added); *see also* 545 U.S. at 275 (Thomas, J., dissenting) ("[t]o obtain habeas relief, then, Miller-El must show that, based on the evidence before the Texas state courts, the *only* reasonable conclusion was that prosecutors had racially discriminated against prospective jurors") (emphasis added). This Court framed the issue similarly in *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969 (2006). It assessed a state court finding that the prosecution's peremptory challenges were not racially motivated, and concluded that while "[r]easonable minds might disagree about the prosecutor's credibility" after reviewing the record, on "habeas review that does not suffice to supersede the trial court's credibility determination." 126 S. Ct. at 976.

Miller-El II and *Rice v. Collins* confirm that, if a state court record supports competing inferences, and if a state court draws one of those inferences, its determination of the facts must be deemed reasonable. Because those precise circumstances exist in this case, federal habeas relief is unavailable.

IV. The state court judgment here cannot be described as "contrary to" this Court's existing case law.

The Ninth Circuit held that "excusing juror [Deal] for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal," and that respondent is therefore entitled to federal habeas relief. Pet. App. 19a-20a. That holding is erroneous. Because it must be presumed that the state courts applied the correct legal standard, and because nothing in this Court's case law prohibits a for-cause removal under the circumstances present here, habeas relief is unwarranted.

A. It must be presumed that the state courts applied the correct legal standard.

Rather than presuming that the state courts applied the correct legal standard, the Ninth Circuit did just the opposite. The Ninth Circuit concluded that *because* the Washington Supreme Court had not expressly found that juror Deal's views substantially impaired his ability to perform his duties as a juror, it necessarily must have applied the wrong legal standard. The Ninth Circuit stated that "[t]he Washington Supreme Court in this case *applied the wrong standard* with respect to juror [Deal]; it nowhere found that juror [Deal] could not follow his oath." Pet. App. 20a n.10 (emphasis in original). Yet AEDPA required the Ninth Circuit to presume that the state courts had applied the *Wainwright v. Witt* standard. Had the Ninth Circuit applied that presumption, it would have been compelled to further conclude that the trial court—in removing

Deal—necessarily *had* found that he "could not follow his oath," and that the Washington Supreme Court had relied on that finding to affirm the trial court's judgment.

Even prior to AEDPA, this Court consistently presumed that a state court—absent some explicit indication to the contrary—had applied the correct legal standard in making a particular ruling. In *Wainwright v. Witt*, the Court noted that, "[a]s we have stated on other occasions . . . , where the record does not indicate the standard applied to a state trial judge, he is presumed to have applied the correct one." 469 U.S. at 431. That same presumption is mandated by AEDPA. In *Woodford v. Visciotti*, 537 U.S. 19, 22-23 (2002), the Ninth Circuit concluded that the California Supreme Court had misunderstood the prejudice standard for ineffective-assistance-of-counsel claims, because the state court —rather than referring to whether it was "reasonably probable" that counsel's deficient conduct affected the verdict—"used the term 'probable' without the modifier 'reasonable.'" This Court, after noting that the case was governed by AEDPA, held that the Ninth Circuit had erred, and that its "readiness to attribute error is inconsistent with the proposition that state courts know and follow the law." *Id.* at 21, 24. "It also is incompatible with §2254(d)'s 'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. at 24.

The presumption that a state court applied the correct legal standard could be overcome by some affirmative indication in the record that the court misunderstood the applicable standard. Here, however, nothing affirmatively suggests that either the state trial court or the Washington Supreme Court misunderstood *Wainwright v. Witt*. In fact, the Ninth Circuit acknowledged that both state courts had expressly applied that standard with respect to two other jurors who had been removed for cause. *See* Pet.

App. 9a-10a (stating that "the trial judge properly excused [juror] X for cause, finding that her views on the death penalty would 'substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and oath,'" and that "[t]he trial judge properly excused juror Y for cause as well, noting that her impairment was 'obvious'"); Pet. App. 13a ("[w]hen the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y, and [Deal] for cause, it found that both X and Y were 'substantially impaired' in their ability to perform their duties as jurors"). It is undisputed, in other words, that the state courts expressly invoked and applied the correct legal standard in addressing two of the for-cause removals in this case. To conclude that the state courts nonetheless applied some other unidentified, and incorrect, standard to juror Deal conflicts with common sense, with AEDPA's "highly deferential" standard of review, and with this Court's longstanding assumption that state courts apply correct legal standards.

B. Because the state court decision here does not differ from results reached by this Court when addressing "materially indistinguishable" facts, it is not contrary to this Court's jurisprudence.

The state court decision in this case cannot be deemed "contrary to" clearly established federal law. In *Williams v. Taylor*, 529 U.S. 362, 406 (2000), this Court held that a state court decision will "be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Here, neither the state trial court nor the Washington Supreme Court reached a result that differs from results reached by this Court when addressing "materially indistinguishable" facts.

Prospective juror Deal indicated a general willingness to follow the court's instructions while simultaneously suggesting that he considered a death sentence appropriate only under criteria not required by Washington law. This Court has never addressed precisely those circumstances. Accordingly, it has never held that a trial court—based on statements that are "materially indistinguishable" from those that juror Deal gave—may not remove a juror for cause. Concluding that the state court decisions were "contrary to" clearly established federal law, as the Ninth Circuit did here, is itself contrary to 28 U.S.C. §2254(d)(1), to Congress's intent in enacting it, and to this Court's case law.

The Ninth Circuit mistakenly suggested that this case is analogous to *Gray v. Mississippi*, 481 U.S. 648 (1986). It concluded that Deal's removal was unconstitutional because, "[j]ust like the juror at issue in *Gray*, juror [Deal] 'ultimately stated that [he] could consider the death penalty in an appropriate case.'" Pet. App. 14a *(quoting Gray*, 481 U.S. at 653). Yet the facts in *Gray* cannot be described as "materially indistinguishable" from the facts in this case. In *Gray*, prospective juror Bounds stated that "I think I could" when asked if she "could vote for the Death Penalty," and she agreed that she had no "conscientious scruples against the imposition of the Death Penalty, if it's authorized by law." 481 U.S. at 653 n.5. The trial court granted the State's request to remove her; this Court held that the trial court erred by doing so. 481 U.S. at 655, 659.

Juror Deal, however, expressed a more qualified willingness to vote for death than did Bounds. Deal stated that "I could [impose a death sentence] *if I was convinced that [that] was the appropriate measure*"; his other statements suggested that death is "appropriate" only if the state proves certain facts—a tendency to kill again or to "reviolate upon release"—that state law did not require it to prove. Pet. App. 17a n.8, 15a n.8, 240a-241a (emphasis added). Deal's statements reasonably can be construed

as reflecting a willingness to vote for death only if the juror's own *personal* standards, as opposed to standards defined by applicable state law, were satisfied. *Gray* contains no reference to statements by juror Bounds that could have been construed in a similar manner.

It also must be remembered that, while the trial court in *Gray* excused the juror at issue for cause, 481 U.S. at 655, neither the trial court nor the Mississippi Supreme Court found that the juror's statements and views rendered her removable under *Wainwright v. Witt*. At trial, "[d]efense counsel pointed out that Bounds' answers to the questions did not render her excludable," and the trial judge "agreed that the prosecutor had not used the appropriate language" in questioning her. 481 U.S. at 655. Moreover, "[e]very Justice of the Mississippi Supreme Court expressly stated that [Bounds] . . . 'was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria.'" 481 U.S. at 659. Further, this Court noted that the state supreme court's ultimate decision—which deemed any error in removing Bounds to be harmless—"is susceptible to three possible interpretations" with respect to how it understood the trial court's actions. *Id.* at 661. None of those interpretations reflected a state supreme court finding that the trial court, in removing Bounds, had believed itself to be applying the *Wainwright v. Witt* standard, or had removed Bounds based on findings that comported with that standard. *Gray*, 481 U.S. at 661. In short, the state courts in *Gray* made no finding—implicit or otherwise—that Bounds' views substantially impaired her ability to follow instructions. For that reason also, the facts in *Gray* cannot be described as "materially indistinguishable" from those in this case. Because the state court decision here is not "contrary to" *Gray* or to any other decision by this Court, AEDPA does not authorize federal habeas relief.

CONCLUSION

This Court should reverse the Ninth Circuit's judgment.

HARDY MYERS
Attorney General of Oregon
MARY WILLIAMS
Solicitor General
* ROLF MOAN
Assistant Attorney General
Justice Building
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002
Counsel for *Amici* States

Of Counsel:
Dan Schweitzer
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

* *Counsel of Record*

February 2007